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No. 84-1538

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALEXANDRA FISHER, MARGUERITE JACOBS, MORT BAKER, RICHARD LAWHORN and ANTHONY KERSHAW, individuals; and LEVIN-ZEMEL, a California corporation,
Appellants,

v.

CITY OF BERKELEY, a municipal corporation; BERKELEY CITY COUNCIL; and BERKELEY RENT STABILIZATION BOARD,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

BRIEF AMICI CURIAE OF THE NATIONAL APARTMENT ASSOCIATION, NATIONAL ASSOCIATION OF REALTORS®, NATIONAL ASSOCIATION OF HOME BUILDERS, CALIFORNIA CHAMBER OF COMMERCE, CALIFORNIA ASSOCIATION OF REALTORS®, CALIFORNIA LODGING INDUSTRY ASSOCIATION, CALIFORNIA BUILDING INDUSTRY ASSOCIATION AND WESTERN MOBILEHOME ASSOCIATION IN SUPPORT OF APPELLANTS

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INTERESTS OF AMICI CURIAE

Pursuant to Rule 36.2 of the Rules of Court, amici file this brief amicus curiae with the written consent of all parties to the case. The letter granting such consent has been filed with the Clerk of the Court.

NATIONAL APARTMENT ASSOCIATION: The National Apartment Association is a nonprofit association which, together with its state and local affiliates, represents the interests of all owners, developers, and operators of residential rental properties who provide shelter for more than 30 million households in this country.

NATIONAL ASSOCIATION OF REALTORS®: The National Association of Realtors® is a nonprofit professional association comprised of persons engaged in all phases of the real estate business. Its membership includes 50 State Associations of Realtors®, over 1,800 Membership Boards of Realtors®, and over 600,000 individuals. The National Association of Realtors® was created in 1908 to serve the public and this Nation by promoting professional competence in the rendition of real estate services and by protecting the rights of owners and users of land. Its efforts for three-fourths of a century both in the public and private sectors have contributed materially to making Americans the best housed people in the world.

NATIONAL ASSOCIATION OF HOME BUILDERS: The National Association of Home Builders represents approximately 134,000 builder and associate members organized in 800 affiliated state and local associations in the 50 states, District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, as well as remodelers and land developers. NAHB members construct at least two-thirds of all housing in the United States.

CALIFORNIA CHAMBER OF COMMERCE: The California Chamber of Commerce is a voluntary, nonprofit business association with more than 4,800 members from virtually every industry and geographic section in the State of California. The Chamber's membership also includes 150 trade associations and it is closely affiliated with 387 local and regional chambers of commerce and more than 167,000 small businesses. The Chamber estimates that its members and affiliated local chambers employ 75% of the private work force in California.

CALIFORNIA ASSOCIATION OF REALTORS®: : The California Association of Realtors® is a voluntary trade association whose members consist of Boards of Realtors® in California and those persons licensed by the State of California as real estate brokers and salespersons who are members of local Boards. CAR is the largest state trade association in the United States and has over 180 affiliated Boards of Realtors® and over 100,000 members. CAR is affiliated with the NATIONAL ASSOCIATION OF REALTORS®. The mission of CAR is to serve in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their individual businesses successfully with integrity and competency and, through collective action, to promote the preservation of real property rights.

CALIFORNIA LODGING INDUSTRY ASSOCIATION: The California Lodging Industry Association is a statewide organization representing the interests of over 5,500 independent owner-operators of transient lodging properties in California, providing temporary shelter for millions of intrastate, interstate, and foreign travelers. Its purpose is to provide programs and services that assist members in realizing and maintaining reasonable returns on their investment properties and supporting an organizational structure that may be utilized to collectively address industry needs, interests, and issues. This segment of California's $29 billion tourism industry is threatened by the unilaterally assumed authority of local governments like Berkeley to strictly control price competition in the marketplace.

CALIFORNIA BUILDING INDUSTRY ASSOCIATION: The California Building Industry Association represents over 4,700 builders of housing and commercial structures throughout the State of California. CBIA members, in the aggregate, produce the majority of the housing construction in the Nation's most populous state. In furthering the interests of its members, CBIA collects and disseminates statistical and other information useful to the industry and represents the industry's interests in various public fora, including the courts.

WESTERN MOBILEHOME ASSOCIATION: The Western Mobilehome Association is a nonprofit organization of some 1,800 members who provide the public with approximately 190,000 mobilehome rental spaces. WMA was formed in 1945 to promote the interests of mobilehome park owners and operators in California through the sponsorship of educational programs, the collection and dissemination of information and publications of interest to mobilehome park owners and tenants, and by participation in legislative and judicial processes where the interests of its membership are at stake.

The issues presented in this case drastically impact upon commercial industries throughout the Nation and are of vital importance to *amici*. The test drafted by the California Supreme Court herein not only permits municipalities to control rent, but also gives them license to regulate nearly every aspect of the economy in the name of health, safety, and welfare, regardless of the impact on more overriding national goals. If this ill-conceived test, which departs significantly from the precedents established by this Court, is allowed to stand, industries throughout the Nation will fall by the sword of local governments whose only concern is to serve their own parochial interests, oblivious to the concerns of national economic policy.

The residential rental industry, vital as it is to the health and welfare of more than one-third of the national population, is increasingly threatened by overreaching municipal regulators who persist in creative and repetitive restrictions with callous disregard for constitutional limitations. The Nation's housing supply is seriously impaired because the economic well-being of the industries represented by *amici*, which require substantial and complex long-term planning and immense long-term financial commitment, is threatened by repeated and capricious regulatory acts such as Berkeley's rent control ordinance.

The practical experience of *amici* and financial industry data indicate that a major factor in the downturn in rental housing "starts" in recent years is increasing distaste toward rental properties as an investment vehicle due to the proliferation of local rent controls which impair profit margins and the capacity to service mortgage debt. As a result, investors and

their lenders are unwilling to risk the capital required to enter the marketplace and serve the consumers' ever-increasing demand for rental housing units. Rent controls not only impede growth, but actually impose a contraction in a huge sector of the market for property rentals and sales, builders' products and services, and mobilehome related services.[1] Thus, there is substantially less work for employees in industries like those represented by *amici* as well as others providing goods and services to the rental housing industry.

Municipal rent controls in California are causing measurable injury to these industries. The situation threatens to worsen should the opinion below be accepted as law, for municipalities nationwide would be free to enact rent-fixing schemes without state authorization and further wreak havoc. In view of these considerations, *amici* subscribe to this brief.

Counsel for *amici* are familiar with the questions presented in this case and the scope of their presentation, and believe that the information and perspective provided herein will assist the Court in its consideration of this matter.

INTRODUCTION

This action challenges as preempted by the Sherman Act, 15 U.S.C. Section 1, et seq., municipal rent control which displaces competition wholesale in the rental housing market in California, with substantial economic effects beyond that city's border. In the complete absence of state policy authorization, Berkeley's scheme eliminates price competition among lessees of housing, just as would a per se illegal buyers' cartel; it substitutes anti-market regulatory determinations based upon the vagaries of the local political process for the "regime of competition" mandated by federal policy.

Berkeley's ordinance demonstrates on its face a municipal judgment that competition itself is unreasonable. Berkeley has rejected the national policy favoring the allocation of resources

[1] The Mobilehome industry is uniquely threatened by municipal advocates of rent control as 51 of the 65 California cites and counties which have succumbed to the temptation to fix rents do so on mobilehome spaces only (of a total of 441 cities and 58 counties.)

through the efficiency of competitive markets over resource control by parochial political fiat. To be sure, the national procompetitive policy is qualified by federalism-based principles permitting *states* as *sovereigns* some discretion to substitute of regulation for competition. But those principles are of no aid here, for Berkeley enjoys no sovereignty of its own and California has not expressly authorized a policy of displacement of price competition in housing with price regulation.

Although the California court upheld Berkeley's scheme under state law, its decision was based on a general "home rule" police power which this Court has held insufficient to insulate municipal suffocation of competition from the national mandate. As the court below acknowledged, California has no state rent control statute. Nor has the recent Congressional enactment of the Local Government Antitrust Act of 1984 relieved Berkeley of its substantive obligations under federal antitrust laws or immunized its ordinances from federal preemption. That Act merely restricted damages while—consciously and deliberately, as its history amply demonstrates—leaving unchanged other remedies for conflicting municipal actions.

Finally, containment of Berkeley's assault on national competitive policy is fully consistent with federalist comity between state and federal institutions. Preempting Berkeley's price-fixing ordinance will not significantly interfere with the ability of municipal governments to meet local needs. State legislatures remain free to grant local anticompetitive programs the state's own protective mantle. They and the Congress are entitled to the presumption that they can and will respond with timely legislation where the need arises.

SUMMARY OF ARGUMENT

In 1980, the City of Berkeley adopted the "Rent Stabilization and Eviction for Good Cause Ordinance" ("the Ordinance"). Appendix G to Jurisdictional Statement ("Appendix"). The Ordinance places a ceiling on the rent that landowners are permitted to charge for approximately 23,000 rental units in Berkeley. Thus, the Ordinance ended market competition throughout this large and important sector and

effectively insulated the current tenants of the controlled units from price competition with other prospective consumers, both from within or without Berkeley. Even though the Berkeley scheme is not affirmatively authorized by state law, the California Supreme Court upheld the Ordinance against a claim that it facially conflicted with and was thus preempted by the Sherman Act. *Fisher* v. *Berkeley,* 37 Cal.3d 644, 678 (1984); Appendix A at A-35. Regardless of the extent to which it might frustrate the national policies embodied in the antitrust laws, that court concluded that an anticompetitive restraint imposed as an act of local government can withstand a claim that it impermissibly conflicts with the Sherman Act so long as it furthers some local purpose rationally related to the municipality's legitimate exercise of its police powers. *Id.* at 675, A-31.

The California Supreme Court acknowledged that its approach to the preemption issue was novel. According to the court, resolution of the antitrust issues posed by the case forced it to "wander off the map and travel cross country without the benefit of trail or compass." *Id.* at 663, A-15. But the court's predicament was one of its own making. In analyzing whether there was a conflict between the antitrust laws and the challenged regulatory scheme, the California court failed to follow the guidance of this Court in opinions that have considered the applicability of the federal antitrust laws to anticompetitive restraints imposed by municipal governments.

Precedents of this Court have clearly established that any arrangement that interferes with the setting of price by free market forces is illegal on its face; that municipal action which discourages conduct encouraged by federal laws is preempted; and that municipal acts inconsistent with Sherman Act objectives may only be saved from preemption where shown to be undertaken pursuant to affirmatively expressed state policy to displace competition with regulation. The California court has ignored these principles and adopted an approach to the antitrust preemption issue that gives municipalities sweeping authority to enact ordinances that favor local constituencies or promote purely parochial or special interests at the expense of the national interests embodied in the antitrust laws. Indeed, it effectively leaves local governments free to disregard these

national interests altogether. No matter how clearly and directly a municipal ordinance might conflict with the core objectives of the federal antitrust laws, it would not be subject to preemption under the California test so long as it advanced, or even purported to advance, some avowed local purpose that can be "rationally related" to the municipal "peace, safety, morals, health or welfare."

The California court's approach permits cities to elevate local policy above important national objectives, effectively standing the Supremacy Clause on its head. It renders the Sherman Act a nullity as applied to many of the most egregious anticompetitive restraints that could be imposed as an act of municipal government. In contrast, this Court has already concluded that the federal antitrust laws reach such restraints. Under general preemption principles, a municipal ordinance which impermissibly conflicts with the federal antitrust laws is invalid, and this Court should so hold in this case because the facial conflict between Berkeley's rent control ordinance and the Sherman Act is unambiguous.

The relief urged herein is straightforward and simple, requiring none of the sweeping changes in the law urged by Berkeley and the court below. Applying familiar, existing law of antitrust scrutiny of price-fixing to Berkeley's activity on its face produces the predictable conclusion that the scheme is virtually indistinguishable in economic effect from long-condemned buyer cartels. The issue is not whether a "violation" as such has occurred, but whether this scheme produces results similar to those produced by a cartel violation, which clearly is the case. Straightforward acknowledgment of inherent conflict between "parochial" interests of discrete local constituencies and national procompetitive goals, combined with other teachings of this Court, make clear that resolution of the question of "conflict" between the Sherman Act and acts of local entities exclude social policy arguments properly directed to legislative bodies.

Berkeley's Ordinance facially abolishes competition among buyers and even criminalizes the setting of price by free market forces. Under this Court's well-established authorities, Berkeley's scheme "conflicts" with the Sherman Act on its face.

Under similarly well-settled preemption analysis, any such facial conflict which invariably precludes obedience to both local and federal policies results in preemption of the obstructing municipal program, unless there has been conferred an exemption from federal policy control. Exemption from Sherman Act policy, it is also well established, is available to municipalities only where they can show their actions to be "state action," implementing affirmatively expressed state policy to displace competition with regulation in that sphere of activity. As the California court has acknowledged, "California has no state rent control statute." Opinion below, 37 Cal.3d at 655, Appendix A at A-6. This question of exemption is, therefore, straightforward and requires no novel extensions of existing law to conclude that the absence of a state policy determination provides no exemption for Berkeley's unilateral acts in derogation of clear federal policy.

The relief sought in this action—a determination that Berkeley's price-fixing scheme is in conflict with federal statutory policy, lacks such state policy sanction as would confer exemption therefrom, and accordingly is preempted—requires no revolutionary extensions of existing stare decisis, but simply straightforward application thereof. Contrary to the California court's rudderless wandering, the well-known *Parker/Lafayette/Boulder*[2] trail, reinforced by 1984 Congressional action, leads inexorably to condemnation of the Berkeley scheme. All that is really required is judicial acknowledgment that Congress *intended* to preempt municipal conduct which is plainly anticompetitive, such as in this case, in the absence of a supportive policy determination by a sovereign state to which federalist comity is to be afforded. All that is required, then, is to see Berkeley's abolition of competition for what it is and apply the clear will of Congress thereto.

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[2] Parker v. Brown, 317 U.S. 341 (1943); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982).

ARGUMENT

I. THE CONGRESS INTENDED TO PROHIBIT MUNICIPAL OBSTRUCTION OF SHERMAN ACT OBJECTIVES IN THE ABSENCE OF "STATE ACTION"

Preemption is governed by the Supremacy Clause of Article VI of the United States Constitution:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. [U.S. Const., Art. VI, cl. 2.]

A claim of preemption under the Supremacy Clause based on a conflict with the Sherman Act is evaluated under the same general principles applicable to an alleged conflict with any other federal statute:

> In determining whether the Sherman Act preempts a state statute, we apply principles similar to those which we employ in considering whether any state statute is preempted by a federal statute pursuant to the Supremacy Clause. As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. [*Rice* v. *Norman Williams Co.* 458 U.S. at 654, 659 (1982).]

A local ordinance is similarly preempted when it irreconcilably conflicts with a federal statute or regulation. *Buck* v. *California,* 343 U.S. 99 (1952) (applying preemption analysis but holding that the particular local ordinance did not conflict with the federal law in issue).

In deciding whether a local ordinance is preempted by the Sherman Act, a court must first examine whether Congress intended the Sherman Act to reach anticompetitive actions taken by local governments. "The preemption doctrine, which has its roots in the Supremacy Clause, requires [the Court] to

examine congressional intent." *Fidelity Federal Savings & Loan Association* v. *De La Cuesta,* 458 U.S. 141, 152 (1982). In *City of Lafayette* v. *Louisiana Power & Light Co.,* 435 U.S. 389 (1977), this Court first considered the extent to which the antitrust laws prohibit cities from "imposing anticompetitive restraints as an act of government." *Id.* at 391. Although the issue arose in the context of the applicability of the so-called "state action exemption" attributed to *Parker* v. *Brown,* 317 U.S. 341 (1943), *Lafayette* and its progeny are also relevant to the inquiry into Congressional intent required under preemption doctrine. As the Court explained in *Lafayette,* the word "exemption" is simply "a shorthand expression" for whether the Sherman Act was "intended by Congress to prohibit the anticompetitive restraint" imposed by the defendant cities in that case. *Id.* at 393 n.8. The Court's conclusion that municipal efforts to impose anticompetitive restraints as an act of government are not "exempt" from antitrust scrutiny is also dispositive of the inquiry whether the preemption doctrine applies when a local ordinance irreconcilably conflicts with the Sherman Act.

In *Lafayette,* the cities argued that, because a municipality is merely a subdivision of a state and only exercises power delegated to it by the state, *Parker's* findings regarding the congressionally intended scope of the Sherman Act apply with equal force to the state's political subdivisions. The Court rejected this argument. *Parker,* the Court emphasized, was based on deference to our "governmental structure of federalism." *Id.* at 400. The basis for *Parker's* holding that the federal antitrust laws do not prohibit a State, "as sovereign," from imposing certain anticompetitive restraints as an act of government was that:

> [G]iven our "dual system of government" in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority," 317 U.S. at 351, a congressional purpose to subject to antitrust control the States' acts of government will not lightly be inferred. [*Id.* at 411-412, quoting *Parker* v. *Brown,* 317 U.S. at 351.]

The Court concluded that cities could not displace the mandates of federal antitrust policy when they restrain competition as an independent act of local government:

> Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them . . . . In light of the serious economic dislocation which the would result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach. [*Id.* at 412-413.]

The *Lafayette* Court observed that there were over 62,000 different units of local government in the United States. In concluding that cities were not exempt from the prohibitions of the antitrust laws, the Court emphasized that, because of their natural inclination to favor local political constituencies, the economic choices made by local governments carried with them:

> [T]he potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established. [*Id.* at 408.]

The Court even went as far as to observe that because, by their very nature, the economic choices of local governments are designed to "ensure maximum benefit for the community constituency," they are "not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders." *Id.* at 403. For these reasons, the Court concluded that the antitrust laws were intended to reach anticompetitive restraints imposed as an act of municipal government unless the restraint was imposed

"pursuant to state policy to replace competition with regulation or monopoly public service." *Id.* at 413. In the absence of evidence that the State authorized or directed the municipality to act as it did, to permit municipalities to be shielded from the antitrust laws when they impose anticompetitive restraints would, "impair the goals Congress sought to achieve by those laws . . . without furthering the policy underlying the *Parker* 'exemption.'" *Id.* at 415.

Limitation of the municipal antitrust exemption to anticompetitive restraints imposed pursuant to a "clearly articulated and affirmatively expressed state policy" was reaffirmed in *Community Communications Co.* v. *City of Boulder,* 455 U.S. 40 (1982. In *Boulder,* the the Court held that Colorado's "home rule" constitutional provision, which conferred upon municipal governments general authority to govern local affairs, did not shield the city from an antitrust challenge to its regulation of cable television. And just last Term, the Supreme Court reemphasized the need for "clearly articulated and affirmatively expressed state policy" to minimize the danger that municipalities will engage in activities which further their own "purely parochial public interests" at the expense of the national economic goals reflected in the antitrust laws. *Town of Hallie* v. *City of Eau Claire,* 105 S.Ct. 1713 (1985).

In the wake of *Lafayette* and *Boulder,* Congress enacted the Local Government Antitrust Act of 1984, P.L. 98-544. The Act and its history are instructive as to Congressional intent. Under the Act, antitrust damages "may not be recovered from any local government, or official or employee thereof acting in any official capacity," a question explicitly left open in both *Lafayette* (435 U.S. at 402) and *Boulder* (455 U.S. at 56-57 n.20). Congress did not, however, disturb the applicability of injunctive relief under Section 16 of the Clayton Act (15 U.S.C. §25 (1982)) to anticompetitive restraints imposed by local governments. It thus confirmed the accuracy of this Court's conclusion that the antitrust laws are meant to prohibit such restraints.

The Act is expressly *not* intended to modify either the substantive antitrust standards evolved by this Court or the *Parker* doctrine:

H.R. 6027 would in no way limit the antitrust immunity for states that the courts have recognized in *Parker* v. *Brown*, 317 U.S. 341 (1943), and subsequent decisions interpreting the "state actions" doctrine. The bill eliminates certain damage suits under the Clayton Act without altering judicial interpretation of the substantive antitrust law. For example, there will be no change in the substantive antitrust law applicable to local governments, or persons with whom they deal, in suits for injunctive relief under Section 16 of the Clayton Act, . . . [House Judiciary Committee Report to the Committee of the Whole House on H.R. 6027, H.R. Rep. 98-965, 98th Cong., 2d Sess. (1984), at 2.]

That reaffirmation of existing judicial interpretation of "substantive antitrust law" by the Congress stands in stark contrast to the opinion below which rejects out of hand the application of "traditional antitrust rules." 37 Cal.3d at 664; Appendix A at A-17. Not only does the opinion of the California court depart significantly from the intent of Congress as to existing substantive stare decisis, but that court went on to adopt a standard of municipal exemption virtually indistinguishable from proposed provisions of the Act which Congress had just rejected. The California court stated its test thusly:

> [W]e have determined that when the validity of an ordinance is challenged under the federal antitrust laws, courts must adapt traditional antitrust rules in order to accommodate municipal governments' legitimate interest in enacting economic and social regulations concerning local health, safety and welfare. We conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an evenhanded manner, it must be upheld against a claim that it conflicts with section 1 or 2 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less intrusive impact on federal antitrust policies. [37 Cal.3d at 651-652; Appendix A at A-2.]

Yet Congress had just rejected H.R. 5992, § 3, 98th Cong., 2d Sess. (1984), which would have provided that, "the antitrust laws shall not apply to official conduct of a local government reasonably undertaken to protect or provide for the public health, safety or welfare." Congress also declined to enact an urged "municipal rule of reason" which was described by Professor Thomas Campbell as follows:

> When a court is presented with a restriction on competition, the Court would engage in a less restrictive alternative analysis * * * [which would] simply require the court to ask, could the unit of local government have achieved its safety, its health, its public welfare objective in a way less restrictive of the Federal interest in competition, less harmful to the consumer. [H.R.Rep. 98-965, supra, at 16.]

The House Report, H.R.Rep. 98-965, describes a number of other proposals of like import, and sets forth unequivocally the Congressional rationale for *not* providing the form of relief suggested by the court below:

> The Subcommittee did not adopt the concept of a ban against private actions aimed at municipalities and their officials. The role of "private attorneys general" in the antitrust enforcement scheme remains central. *If Congress were confident that the actions of local governments and their officials were always in the public interest or would never work unnecessary anticompetitive injury, it could simply exclude them from the application of the antitrust laws entirely. The record does not support such action at this time.* The record does support, however, the notion that municipalities—and their taxpayers who must ultimately shoulder the burden—should not be subject to punitive sanctions in the form of treble damages. [*Id.* at 18 (emphasis added).]

In summary, municipal economic regulations which lack clearly articulated state authorization or direction, though perhaps not violating the letter of the antitrust laws, nonetheless irreconcilably conflict with their underlying objectives, and are properly subject to preemption. Otherwise, cities will have

sweeping power to enact anticompetitive ordinances that "place their own parochial interests above the Nation's economic goals reflected in the antitrust laws." *Lafayette,* supra, at 413.

II. THE BERKELEY ORDINANCE IS PREEMPTED BECAUSE IT IRRECONCILABLY CONFLICTS WITH THE SHERMAN ACT'S CENTRAL AND UNEQUIVOCAL PURPOSE OF PRESERVING PRICE COMPETITION

In a long series of cases, this Court has established the principles for determining when a state or local law impermissibly conflicts with and is thus preempted by a federal statute: "A conflict will be found 'where compliance with both federal or state regulations is a physical impossibility' . . . or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941). Under preemption analysis, as *Hines* makes clear, a conflict between a federal statute and a local ordinance can arise in either of two different ways: An ordinance can compel conduct that the federal statute prohibits; alternatively, an ordinance can effectively prohibit conduct that the federal statute seeks to promote. *See, e.g., Nash* v. *Florida Industrial Comm.,* 389 U.S. 235 (1967); *Jones* v. *Rath Packing Co.,* 430 U.S. 519 (1977).

The raisin pricing scheme upheld in *Parker* v. *Brown,* supra, 317 U.S. 343 (1943), unquestionably was in "conflict" with the objectives of the Sherman Act; it was saved only because it fit within an implied *exemption* therefrom. 317 U.S. at 350-351; cf. Tribe, *American Constitutional Law,* § 6-24 (Foundation Press, 1978). The issues of "conflict" and "exemption" are separate issues, dealing on the one hand with economics and on the other with federalist comity.

In *Rice* v. *Norman Williams Co.,* 458 U.S. 654 (1982),this Court determined that an importer "designation" statute which appeared to restrain intraband competition in liquor did not "irreconcilably" conflict with the Sherman Act on its face. Since restraint of intraband competition was not a per se prohibited activity, the Court reasoned it could not be *facially* determined that the Acts were "irreconcilably" in conflict,

distinguishing that situation from *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum Inc.,* 445 U.S. 97 (1980), on the basis that the *Midcal* scheme on its face abolished price competition (just like the Berkeley Ordinance here), a restraint long adjudged per se unreasonable. *Id.* at 659-660. Accordingly, *Rice* reaffirms the principle that, absent *Parker* immunity, a scheme which compels abandonment of the setting of price by free market forces is "irreconcilably" in conflict with federal antitrust policy.

As in *Midcal,* the Berkeley Ordinance on its face prohibits competitive conduct that the Sherman Act seeks to promote, and similarly is preempted under familiar "irreconcilable" conflict analysis. Proof of "violation" is not necessary. Even those cases in which this Court has invalidated a state law that mandated or authorized a "violation" of the antitrust laws have in fact dealt with schemes creating the functional equivalent of a violation, rather than a "violation" as such.[3] For example, under the statute struck down in *Midcal,* wine producers and wholesalers were required to either sell under fair trade contracts or to post and follow a resale price schedule. No private agreement was involved whenever producers or wholesalers elected to post resale prices. (The state compulsion prohibiting resale price competition eliminated the need for a private agreement.) Similarly, in *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951), the conflict with the antitrust

[3] It is an open question whether, solely by enacting an ordinance that eliminates price competition, a city could ever be deemed to have "violated" the Sherman Act. In many such cases, it will probably be difficult to prove that a city participated in unlawful concerted action. The California Supreme Court, however, also suggested that the Berkeley rent control ordinance was not subject to preemption unless the plaintiffs could demonstrate "the requisite concerted action" necessary to establish an antitrust violation. 37 Cal.3d at 662, Appendix A at A-15. Appellants demonstrate that the Ordinance mandates joint anticompetitive conduct. Jurisdictional Statement at 12; Appellant's Reply Brief to Appellee's Motion to Dismiss or Affirm at 3. Even so, the concerted action requirement has no logical applicability to a situation in which an anticompetitive local ordinance is challenged on the grounds that it stands as an obstacle to accomplishment of the full purposes and objectives of the Congress in enacting the antitrust laws. The principal claim here is not that the city seeks to authorize or compel illegal anticompetitive behavior, but rather that, by an act of government, it has prevented procompetitive behavior. *See generally* P. Areeda & D. Turner, *Antitrust Law,* Vol. 1, (Little, Brown & Co., 1978).

laws arose from the state-imposed requirement that non-contracting retailers abide by "fair trade" prices. A manufacturer's use of a fair trade contract, which by operation of law triggered the non-signer requirement, was not itself illegal and did not conflict with the Sherman Act as amended by the Miller-Tydings Act. The statute was invalidated because it imposed a restraint on non-signers, such that they were "driven into a compact in violation of the *spirit* of the proviso [of the Miller-Tydings Act] which forbids 'horizontal' price fixing." 341 U.S. at 389 (emphasis added).

It is open to earnest debate—and unnecessary to disposition of this case—whether in light of the potential defense of compulsion of (albeit unlawful) law, the Berkeley Ordinance mandates private conduct that "violates" the antitrust laws. More importantly, however, the Ordinance on its face "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the antitrust laws. *Hines* v. *Davidowitz*, supra, at 67. Clearly, it compels private conduct that, if agreed on by private parties, would be a per se violation of the antitrust laws.

Certain practices are held to be per se violations of the Sherman Act because the practice facially appears to be one that would always or almost always tend to restrict competition. *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1978). The most notorious group of per se illegal Sherman Act violations are those that fix prices or otherwise eliminate price competition. Because "[p]rice is the central nervous system of the economy,'" *National Soc. of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1977), quoting *United States* v. *Socony-Vacuum Oil*, 310 U.S. 150, 224-226 n.59 (1940), the preservation of price competition is an object of special solicitude under the antitrust laws. Through the operation of free markets, price competition produces "the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time producing an environment conducive to the preservation of our democratic, political and social institutions." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 4

(1958). Accordingly, local governmental regulations that eliminate price competition are especially suspect under the Sherman Act.

Indeed, this Court has consistently invalidated or refused to enforce state statutes that precluded competitors from engaging in fully competitive pricing. In *Schwegmann*, the Court was faced with a state liquor law that allowed resale price maintenance. Resale price maintenance was legal at that time under the Miller-Tydings Act.[4] However, the state law at issue in *Schwegmann* not only authorized resale price maintenance between a manufacturer and those retailers who voluntarily agreed to be bound by the manufacturer-determined resale price, but also required non-contracting retailers to abide by the same price. In effect, the state was mandating parallel pricing among all retailers of a particular product. Reversing an injunction against a non-signing retailer for selling at less than the official prices, the Court held that:

> [T]he Miller-Tydings Act expressly continues the prohibitions of the Sherman Act against "horizontal" price fixing by those in competition with each other at the same functional level. Therefore, when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids. *See Parker* v. *Brown*, 317 U.S. 341, 350. Elimination of price competition at the retail level may, of course, lawfully result if a distributor successfully negotiates individual "vertical" agreements with all his retailers. But when retailers are *forced* to abandon price competition, they are driven into a compact in violation of the spirit of the proviso which forbids "horizontal" price fixing. [341 U.S. at 389 (footnote omitted; emphasis in original).]

Similarly, the Court in *Midcal* struck down a California statute that prohibited fully competitive pricing in the wholesale distribution of wine. California required wine producers and wholesalers either to sell wine under fair trade contracts or to

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[4] Ch. 690, 50 Stat. 693 (1937) (codified at 125 U.S.C. §1). The Miller-Tydings Act was repealed by the Consumer Goods Pricing Act of 1975, Pub. L. 94-145, § 2, 89 Stat. 801.

post resale prices that would bind all of the wine merchants in a trade region. In striking down the statute, the Court noted that such a restraint "destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.' " 445 U.S. at 103, quoting *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911). Because the state had prohibited full price competition, the law could not be enforced.

The rent ceiling imposed by the Berkeley Ordinance bans the use of price competition as a mechanism to allocate access to existing rental housing in the city. It thus represents "nothing less than a frontal assault on the basic policy of the Sherman Act." *National Soc. of Professional Engineers* v. *United States*, supra, at 679. And the fact that the ordinance establishes maximum rather than minimum prices does not diminish the seriousness of this conflict. As this Court recently stated, the antitrust laws are "grounded on faith in price competition as a market force and not on a policy of low selling prices at the price of eliminating competition." *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 348 (1982), quoting Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 N.W.U. L.Rev. 137, 142 (1962).[5] The Sherman Act "reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *National Soc. of Professional Engineers* v. *United States*, supra, at 679.

[5] The price ceiling imposed by the Berkeley Ordinance is more analogous to the maximum price set by a cartel of buyers with market power than the producer price ceiling held per se illegal in *Maricopa*. Buyer cartels are just as harmful as seller cartels. As in the case of the standard producer price fixing cartel, the price fixed by a buyer cartel restricts total output in the interest of appropriating the maximum possible surplus to the cartel members. Although the observation is not critical to the argument advanced here, it is worth noting that the courts have consistently condemned buyer cartels under the Sherman Act. *See, e.g.*, Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) (agreements among competing buyers to purchase at specified price violates the Sherman Act); Radovich v. National Football League, 352 U.S. 445 (1957); Anderson v. Shipowners' Assn., 272 U.S. 359 (1926); Live Poultry Dealers' Protective Assn. v. United States, 4 F.2d 840 (2d Cir. 1924) (Sherman Act forbids all agreements preventing price competition among members of a group of buyers if they are numerous enough to affect the market); Union Carbide & Carbon Corp. v. Nisley, 300 F.3d 561, 575 (10th Cir. 1962).

On its face, the Berkeley Ordinance demonstrates direct and irreconcilable conflict with the core objective of the Sherman Act—the preservation of price competition as the congressionally preferred means of allocating resources among alternative users. An agreement among private parties that " 'interferes with the setting of price by free market forces' [citation] is illegal on its face," even if, strictly speaking, the agreement does not amount to "price fixing as such." *National Soc. of Professional Engineers* v. *United States*, supra, at 692 (holding illegal a privately adopted ban on competitive bidding). When accomplished by a municipal act of government, the threat to the national policy posed by a ban on price competition is even greater. Private efforts to eliminate price competition by agreement are invariably subject to erosion due to cheating by the participants or entry by other producers who are not bound by the price fixing agreement. When prices are fixed by municipal law, however, the restraint is airtight.

III. INVALIDATION OF BERKELEY'S PRICE-FIXING SCHEME DOES NOT THREATEN THE POWER OF LOCAL GOVERNMENT TO ATTEND TO LOCAL NEEDS

Not every local regulation that restrains competition irreconcilably conflicts with the antitrust laws. Not even private parties are prohibited from engaging in joint ventures and other kinds of cooperative arrangements where an agreement on price is "necessary to market the [jointly produced] product at all." *Broadcast Music, Inc.*, v. *Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 23 (1979). *Cf. National Collegiate Athletic Assn.* v. *Board of Regents of University of Oklahoma* ____ U.S. ____, 204 S.Ct. 2948 (1984). The provision of most traditional public functions of government, such as fire and police protection, entail "natural monopolies," reasonably acquired and long held to be beyond the reach of the Sherman Act. Regulation of the use of the cities' own "integral" facilities such as streets, sidewalks, and public buildings do not generally implicate antitrust laws any more than the choices of a private actor to unilaterally determine the price and terms upon which it will sell or lease its property. Such unilateral requirements

are *consistent* with antitrust policy, reflecting the function of another independent decisionmaker in the marketplace. Simply put, the vast majority of familiar government actions are neutral or facilitative toward the competitive, free-market model of the economy which the Congress sought to promote. Thus, state or local regulation that enhances the same ends sought to be achieved by the Sherman Act is permissible without conflict with the federal antitrust laws.

In contrast, economists are "virtually unanimous in their condemnation of rent control laws." 37 Cal.3d at 716, Appendix A at A-83 (Lucas, J., dissenting). Despite well-intentioned social objectives they restrict output, exacerbating the shortage they claim to remedy.[6] Under *Lafayette* and *Boulder,* local governments are not free to sacrifice the national objectives embodied in the antitrust laws whenever they want to bestow an economic benefit on a local political constituency (such as current occupants of rental housing) at the expense of a less well-represented, perhaps "absentee," group (such as rental owners or prospective tenants). Nor, unless the antitrust laws are to be rendered a virtual nullity as applied to anticompetitive restraints imposed as acts of local government, can municipalities be permitted to sacrifice these concrete national objectives to such ephemeral asserted local goals as promoting the "diversity" of the local rental community or relieving a political constituency from "unwarranted" rent increases due to a putative housing crisis.[7]

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[6] *See, e.g.,* Muth, *Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 692 (1983); Siegan, *Commentary on Redistribution of Income Through Regulation in Housing,* 32 Emory L.J. 733 (1983); Baird, *Rent Control: The Perennial Folly,* 54-78 (1980); *Rent Control, A Popular Paradox* (Fraser Institute ed. 1975); Rabin, *The Revolution in Residential Landlord-Tenant Law,* 69 Cornell L. Rev. 517, 555; (1984) Friedman & Stigler, *Roofs or Ceilings? The Current Housing Problem,* in *Rent Control, A Popular Paradox,* supra, 100; Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws,* 69 Cornell L. Rev. 604, 609-610 (1984).

[7] Empirical studies of rent control show that, without exception, its predominant effect is a deterioration in rental housing stock and a decrease in its availability, thus aggravating the effects of any housing crisis that might actually exist. *See* Hirsch, *From "Food for Thought" to "Empirical Evidence" About Consequences of Landlord-Tenant Laws,* 69 Cornell L. Rev. 604 (1984); Johnson, *Rent Control and Distribution of Income,* 41 Am. Econ.

(footnote continued on following page)

Most importantly, those municipal activities which do have demonstrable anticompetitive effects enjoy adequate state policy support to shelter them within the exemption of *Parker* v. *Brown.* Certainly judicial experience to date has reflected this fact; of the dozens of practices thus far examined in the courts, only a handful have been found non-exempt.[8] This would seem a fairly reliable indicator that if nearly all practices thought *vulnerable* to challenge are exempt, an even larger proportion of existing practices that have not been contested enjoy similar protection. For example, *every* municipal rent control program known to *amici* outside the State of California is a part of or authorized by a state program of rent regulation. *See, e.g.,* McKinney's Unconsolidated Laws of New York, Book 65, Section 2A: 42-74 et seq.; Massachusetts General Laws, Ch. 797, Section 1 et seq. and Ch. 842, Section 1 et seq.; Maine Rev. Stats. Ann., Title 30, Ch. 24; Barr, et al., 8 Clearinghouse Review 240-9 (1974) and statutes cited therein. Accordingly, it would be erroneous to assume that preemptive

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(footnote continued from preceding page)

Rev. 569 (1951); and Grampp, *Some Effects of Rent Control,* 16 S. Econ. J. 425 (1950). *See generally,* bibliography in *Rent Control—Myths & Realities,* E. Block and E. Olsen ed. (1981) citing over two hundred articles to this general effect. It should also be noted that there are other, generally more efficient ways than rent control of dealing with a genuine housing crisis that do not entail the elimination of price competition or otherwise irreconcilably conflict with the antitrust laws. In his dissent to the opinion of the California court, Justice Lucas listed some of the non-conflicting alternatives available to the city: *"Rent subsidies* may be provided to needy tenants. *Public housing grants* may afford additional units. Property may be municipally acquired through *negotiated purchase or condemnation."* 37 Cal.3d at 718, Appendix A at A-86. (Emphasis in original.) There is also no rational reason to believe that rent control expands the housing opportunities of minorities or the aged. When price is prohibited by law from being used to allocate access to rental housing, the importance of other selection criteria is enhanced.

[8] *See, e.g.,* Town of Hallie v. City of Eau Claire, 105 S.Ct. 1713 (1985); Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983); Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612 (6th Cir. 1982), Euster v. Eagle Downs Racing Assn., 677 F.2d 992 (3d Cir. 1982); Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272 (9th Cir. 1982); Golden State Transit Corporation v. City of Los Angeles, 726 F.2d 1430 (9th Cir. 1984); Springs Ambulance Co. v. City of Rancho Mirage, 745 F.2d 1270 (9th Cir. 1984), and cases cited therein. *Springs Ambulance* may be an exception inasmuch as a question remains whether one non-exempt aspect of the price fixing has been abandoned by the city, 745 F.2d at 1273-1274.

invalidation of the Berkeley Ordinance would necessarily impact upon state-authorized rent controls in other jurisdictions.

Nor can it be overlooked that municipalities confronted with antitrust claims have a viable and effective political remedy for defective or non-expressed authorizations which fail to insulate their activities. Where a city is engaging in activity which truly is consistent with state policy, that city should have little difficulty persuading its legislature to enact clearer authorizations to stifle any litigation which threatens on that basis to thwart the furtherance of that (inadequately expressed) state policy. If, of course, the municipality encounters stiff opposition and *cannot* obtain express authorization, something real and tangible will have been demonstrated regarding the existence or nonexistence of such a policy. It is certainly fair to suggest that popular legislation moves more swiftly than preemption litigation (particularly where a program important to state policy is under attack and can be saved by legislation merely expressing existing policy). It is hard to conceive of any substantial risk that genuinely state-approved programs will suffer the disability of preemption—or that following such invalidation the legislature would fail to correct the situation promptly.

At least one recent real-world example of this mechanism is illustrative. In 1984, in response to a Federal Trade Commission action against the City of New Orleans for suppression of taxicab competition, the Louisiana State Legislature promptly enacted an authorizing statute which painstakingly articulates and expresses a state policy to permit the city to restrain taxicab competition through the means then under attack. La. Stats. Ann. 33:4791, Supp. 1985. If this instant claim of preemption really threatened the policies of the State of California remedial legislation would have been enacted by now or certainly would be enacted swiftly on the heels of the judgment of invalidity urged herein. The plain truth is that Berkeley has pursued simply and solely its own parochial interests. As *Lafayette* and *Boulder* make clear, municipal governments are not free to promote every purely parochial interest that can be rationally related to the municipality's police powers at the expense of the paramount national objectives embodied in the federal antitrust statutes. Berkeley

has subordinated the national policy in favor of price competition, an object of special solicitude under the antitrust laws, for the sole purpose of shifting wealth to a favored discrete political constituency—current occupants of the city's rental housing—by insulating them from future price competition with other prospective tenants.[9] This facially evident course of conduct is nothing less than the "parochial" rejection of federal policy forewarned in *Lafayette*. Unless preempted, the precedents of this Court and the will of Congress will be "wholly eviscerated" by Berkeley under the guise of its municipal police power.

IV. NO "STATE ACTION EXEMPTION" APPLIES TO BERKELEY'S ANTICOMPETITIVE CONDUCT

As this Court has repeatedly ruled, most recently in *Town of Hallie* v. *City of Eau Claire*, 105 S.Ct. 1713 (1985), even those anticompetitive acts of local governments which conflict with the economic policy of the Sherman Act are exempt by Congressional intent if they constitute "state action" pursuant to "clearly articulated and affirmatively expressed" state policy to displace competition with regulation. No such policy shelters Berkeley's scheme. As noted by the court below, "California has no state rent control statute." Opinion below, 37 Cal.3d at 655, Appendix A at A-6. The relevant portions of the statutes belatedly asserted by Berkeley below as stating a policy on rent control are set forth verbatim in the Jurisdictional Statement, pages 4-5. As a reading thereof readily demonstrates, each of those statutes is either a declaration of *neutrality* as to rent control or a preemptive *prohibition* thereof in a specific context.

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[9] For example, Under Section 12, subdividion (c)(3) of the Ordinance, a landowner is not entitled to increase the rent on a unit to reflect the cost of capital improvements unless those improvements were "necessary" to bring the property into compliance with applicable local code requirements affecting health and safety. Thus, because he could not charge a commensurately higher rent, the landowner would have absolutely no incentive to incur the costs of upgrading his rental property so as to make it attractive to a different clientele than the one currently occupying it. Together with the rent ceiling, this provision thoroughly insulates current occupants from having to compete with other potential future consumers of the rental housing they now occupy—an economic boon of no small value.

Government Code §65589 not only declares at subdivision (b) that nothing in that article constitutes *authorization* for rent controls; it also disclaims in subdivision (c) that it similarly does not grant additional authority for "measures that may be taken . . . to implement" the state housing policy embodied in that article. This distinction shows that the Legislature saw rent control as something *other than* a measure taken to implement state housing policy.

Health and Safety Code §1518 prohibits rent controls on licensed community care facilities, which Berkeley now theorizes was an implied *authorization* of controls in any other context. Such silence cannot be construed as anything more than *neutrality* and certainly not a "clearly articulated and affirmatively expressed" policy favoring price regulation to the exclusion of competition in rental housing.

Health and Safety Code §§50008 and 51852.5 likewise contain no authorization for municipal rent control. While subdivision (a)(2) of §51852.5 may appear to "contemplate" rent controls as to certain low income households, that section is part of a government-supported mortgage program wherein owners of property freely contract to supply a number of low-income units at controlled rents in consideration for low-cost financing. Section 50202 provides the key to §51852.5; it states clearly that (a) it does *not* authorize controls on units not financed under that program, and (b) there are permitted *no* controls on the latter units other than those specified in the regulatory contract freely entered into by the owner in consideration for the financing advantages conferred.

It follows that the "state policy" now claimed by Berkeley is made up of expressions of neutrality, disclaimers, and prohibitions—hardly a "clearly articulated and affirmatively expressed" enlistment of Berkeley as agents of the state to implement state policy, thereby implicating federalism. Acceptance of these neutral-to-negative "mentions" of rent control as an affirmative policy statement would truly "wholly eviscerate" the precedents of this Court. See *Community Communications* v. *City of Boulder*, supra, at 55-56. The real source of authority for Berkeley's price-fixing scheme is the same kind of "home rule" constitutional provision (Cal. Const., Art. XI, § 7) found

inadequate by this Court in *Boulder. Birkenfeld* v. *City of Berkeley,* 17 Cal.3d 129, 140 (1976). In fact, the statutory provisions now relied upon by Berkeley *postdate* Berkeley's excursions into residential price-fixing by at least eight years. The adequacy of state authorization to confer a federal exemption to a federal policy is, of course, a federal question properly justiciable by this Court, the state court having foreclosed its opportunity to rule thereon. *See Town of Hallie,* supra, 105 S.Ct. at 1719 n.8; *Chambers* v. *Mississippi,* 410 U.S. 284, 290 n.3 (1973).

CONCLUSION

Congress mandated competition as the "polestar" by which all must be guided in making economic choices. *Lafayette* v. *Louisiana Power & Light Co.,* supra, at 406. At least in the absence of state direction or authorization, this "fundamental national policy" may not be subverted by municipal governments in their efforts to confer economic benefits on local political constituencies. Because the Berkeley Ordinance on its face conflicts with the most basic objective of the antitrust laws, the preservation of price competition, and lacks any express supportive state policy such as to invoke federalist exemption, the Ordinance is preempted and this Court should so hold.

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Respectfully submitted,

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